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In the Supreme Court of the United States

No. 396.

October Term, 1918.

BUTTE & SUPERIOR COPPER COMPANY, LIMITED, A CORPORATION,
(Defendant) Appellant,

vs.

CLARK-MONTANA REALTY COMPANY, A CORPORATION, AND ELM ORLU MINING COMPANY, A CORPORATION,
(Plaintiffs) Appellees.

Appellant's Reply Brief.

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In the Supreme Court of the United States

No. 598.

October Term, 1918.

BUTTE & SUPERIOR COPPER COMPANY, LIMITED, A CORPORATION, (Defendant) Appellant,

vs.

CLARK-MONTANA REALTY COMPANY, A CORPORATION, AND ELM ORLU MINING COMPANY, A CORPORATION, (Plaintiffs) Appellees.

Appellant's Reply Brief.

Appellees in their brief (referring to appellant's assignments of error directed to the Court's findings respecting the Pyle vein) say:

> "In view of the specific findings and of the well settled principle that the concurring findings of the two courts below will not be disturbed in this Court, we presume these assignments will be disregarded."

And quote from the opinion of the Circuit Court of Appeals as follows:

> "The appellant does not assert that the findings of fact are unsupported by competent evidence, but contends that they are contrary to the weight of the evidence."

This discloses a clear misapprehension upon the part of that learned tribunal. In appellant's brief in that Court (speaking of the trial Court's findings respecting the Pyle branch), it was said:

> "Moreover, in the case now before the Court the finding under discussion is not based upon conflicting evidence, but is one which finds no support whatever in the testimony."

In that Court the contention of the appellant was, as it here is, that this finding is unsupported by evidence. Apart from testimony respecting disclosures in the Pyle raise not a single witness claimed that he had observed, or been able to discover, the top or apex of the Pyle vein anywhere within the boundaries of the Elm Orlu claim easterly of the 301 plane. And, as pointed out in appellant's opening brief, Mr. Greene expressed no opinion whatever as to whether the top of the vein was or was not found in that raise; while Professor Irving testified that it might continue upward beyond where there disclosed. Mr. Weed believed that it could be traced further upward, how far he did not know, and Mr. Searles testified that the vein might continue upward to the surface. And the trial Court says in effect that it cannot be determined from the evidence whether the vein found in the Pyle raise has its top or apex in the Elm

Orlu or Black Rock claim. We quote from the opinion of the trial Court (Transcript, page 45):

> "350 feet above the raise the country has been thoroughly crosscut by the Clark and connected workings in which are slips, seams and more than fifteen small veins, some in each claim, some of those in one claim as reasonable to be correlated with the Pyle as those in the other. These premises are filled with slips, gouges, seams, veinlets and veins, and will not permit correlation or projection of small features like the Pyle at the Elm Orlu 500, save for slight distances. Plaintiff's witnesses are in doubt whether the Pyle ends in the raise or continues to the surface; defendant's witnesses incline to the opinion it continues upward; that the southerly dipping slip of the raise is the Pyle fissure and should apex in the Black Rock. This slip, if the Pyle fissure, may contain ore above, though mineralization ceased in the raise, and have its apex in some indefinite place above. Where is the apex of that part of the Pyle at the Union on the Black Rock 1100 level, is conjecture. Even if that 'sliver' of the Pyle crossing the Elm Orlu east end line at the 800 level could serve as a vein to confer extralateral rights, where is its apex and whether on dip it unites with the Rainbow, are also conjecture."

We admit, as pointed out in appellee's brief at page 44, that the Pyle branch has been developed at the 1200 level, and for considerable distances on the 800, 900 and 1000 foot levels. But the crucial question is: Where is its top or apex? Not where the vein may be found at depth.

But if it could be conceded that there was testimony in support of the Court's findings that "the Pyle strand of the Rainbow vein diverges from the south side of the

latter vein in the Elm Orlu claim and there and for some indefinite distance easterly has its apex in the Elm Orlu claim," the error which appellant complains of would be in no way affected thereby.

The plaintiffs—appellees—in their complaint allege that this fork of the vein, viz., the Pyle branch, continued easterly within the Elm Orlu claim from the point of the forking to and across the easterly end line of the claim; that in its downward course it so far departed from the perpendicular as to pass beyond the northerly side line of the Elm Orlu claim into and beneath the Black Rock claim, and that plaintiffs were the owners of this vein throughout its entire depth. At the trial plaintiffs contended, as they had the undoubted right to contend under the allegations in their complaint, that this Pyle vein in its downward course united with the main Rainbow lode found beneath the surface of the Black Rock claim easterly of the 301-foot plane at or about the 1200-foot level of the Black Rock, and that the Elm Orlu claim being, as plaintiffs claim, prior in right, the plaintiffs were the owners of the entire vein so united below the plane of union westerly of the plane drawn through the easterly end line of the Elm Orlu claim continued northerly in its own direction. So the plaintiffs compelled the appellant (defendant) to litigate the question of ownership of all ore bodies beneath the surface of the Black Rock claim below the alleged plane of union between the Pyle and the Rainbow found in the Black Rock claim easterly of the 301-foot plane. And appellant's insistence here is that appellees, having failed to estab-

lish their pretended claim of ownership to these ore bodies, the Court should have entered a decree in favor of defendant (appellant) quieting its title to all of these ore bodies against any further assertion of adverse claim thereto on the part of the plaintiffs (appellees). How completely plaintiffs (appellees) failed to establish their alleged claim of ownership to the ore bodies below the alleged plane of union is shown by the uncontradicted testimony of Mr. Searles, a witness on behalf of plaintiff (Record, pages 354-5,) from which it appears that throughout the easterly 635 feet of the Elm Orlu claim the only opening claimed to be upon the Pyle vein above the 800 level was the Pyle raise; that the top of this raise, or the drift therefrom, is 410 feet beneath the surface; that at the westerly end of the 635 feet the vertical distance from the surface to the first working below is about 900 feet, and at the easterly end of the 635 feet, or the east end line of the Elm Orlu claim, it is about 600 feet vertically to the uppermost working. It is unnecessary to comment upon the insufficiency of a showing such as this, to justify one in the assertion of ownership of ore bodies found outside of the boundaries of his own claim and beneath the surface of his neighbor's territory.

Appellees in their brief cite some cases holding that where a vein at its apex has been developed for some distance and shown to be coursing in a direction substantially parallel to the side lines of the claim, the presumption, in the absence of evidence to the contrary, may be indulged that it continues throughout the claim from

end to end. We need not quarrel with these cases, for manifestly no one of them has, or was intended by the Courts ruling them to have, any application to the facts of a case such as we have here to deal with. Let us see: We will suppose that Smith, the owner of the "A" claim, brings trespass against Jones, claiming that defendant Jones has unlawfully entered upon and taken ore from beneath the surface of Smith's "A" claim, and Jones answers. On the trial the plaintiff Smith proves his ownership of the "A" claim; the extraction of the ore by the defendant Jones; the tonnage and value of the ore so taken; and rests. He has made a prima facie case—presumptively all the ore beneath the surface of his "A" claim was his property. Now, if defendant seeks to justify the apparent trespass upon the ground that the ores so taken by him lay in and belonged to a vein which had its apex in an adjoining claim owned by defendant, he must, in order to make good his defense, establish that this adjoining claim of his is so laid upon the apex of the vein as to give him extralateral rights thereon between bounding planes which would include all of the ore which he had taken from the "A" claim, and that between such planes the vein was continuous in its downward course from such apex, and that the ores in controversy were a part of that vein. Having shown these facts his defense would be made out, notwithstanding he failed to show that the apex of the vein crossed both or either of the end lines of his claim. So also, if the owner of a mining claim brings suit to quiet title to ore bodies beneath the surface of a claim owned by his

neighbor, he must fail unless he is able to show that the ore bodies in controversy belonged to a vein the apex of which is in his (plaintiff's) claim, and that his location is so laid upon the apex thereof as to secure to him an extralateral right upon the vein which would embrace the ore bodies the ownership of which is in dispute. No case cited in the brief of appellees announces a doctrine in conflict with what is here stated. Indeed, each of them recognizes it. For instance, in the case of *Wakeman* v. *Norton*, 24 Colo. 192, 49 Pac. 283-6, the Court, at page 285, says:

> "While it is true that the locator of a mining claim takes it subject to the right of others to follow and take ore from any vein on its dip through his ground the top or apex of which is included within another valid lode location, yet we think he is entitled to the presumption that what is contained within his surface boundaries is his, unless the conditions upon which such extralateral right depends are shown to exist, by the one who seeks to avail himself of such right. In *Mining Company* v. *Fitzgerald*, 4 Morrison Mining Reports 380, Federal Case No. 8158, Judge Hallett thus concisely states what we believe to be the correct rule in such cases: 'Within the lines of each location, the owner shall be regarded as having full right to all that may be found, until someone can show a clear title to it as part of some lode or vein having its top and apex in other territory. To state the proposition in other words, we may say that there is a presumption of ownership in every locator as to the territory covered by his location, and within his own lines he shall be regarded as the owner of all valuable deposits until someone shall show by preponderance of testimony

that such deposits belong to a lode having its top and apex elsewhere.'"

In the case of *Bourne* v. *Federal Mining and Smelting Company* (cited by appellees), 243 Federal 466, the Court, at page 468, says:

> "The plaintiff asserts an extraordinary right, not incident to ownership under the common law, but conferred by statute. He seeks to go outside of the boundaries of his own claim and penetrate the possessions of another. Prima facie, the defendant is the owner, not only of the surface, but of all beneath the surface, of its claims. This presumption that its ownership is exclusive is effective to repel intrusion by anyone who does not come clothed with a title acquired by virtue of a compliance with the provisions of the statute. By this suit the plaintiff seeks constructively to enter beneath the surface of the defendant's claims and to take therefrom valuable deposits. Necessarily he assumes the burden of proof, and it is incumbent upon him to show, by a preponderance of the evidence, such a location of the Ontario claim as, under the law, entitles him to follow the lode, apexing therein, to and into the defendant's claims." (Citing many cases; among others *Lawson* v. *U. S. Mining Company,* 207 U. S. page 1.)

Appellees in their brief, page 40, also quote from the instructions given the jury by Judge Hunt in *Montana M. Co.* v. *St. Louis M. & M. Co.,* 147 Federal 897. It is only necessary to invite the Court's attention to what was said by the appellate court respecting these instructions at pages 909-911.

Carson City G. & S. Co. v. *North Star Mining Co.,* 73 Federal, is also cited by appellees. If we refer to the

diagram in that case, on page 598, and the comments of the Court, page 601, explanatory thereof, it will be found the apex of the vein of the North Star claim had been followed and identified for a distance of about 2200 feet in an easterly and westerly direction and to within a comparatively few feet of the easterly end line. Throughout the distance that the vein at its apex had been identified it had a course nearly midway between and substantially parallel to the side lines of the claim. The Court held, and reasonably so, that the presumption should be indulged that it crossed this end line. It will also be noted in the diagram that the apex within the claim had been followed and identified for a distance much greater than would be required to embrace extralaterally all of the ore bodies there in controversy.

A few words with reference to the case of *Keeley* v. *Mining Company*, 169 Federal 601, cited by the trial court in its opinion, and referred to at page 57 of appellee's brief. In that case, the plaintiffs, being owners of the Henrietta lode mining claim, brought their suit against the defendant to quiet title to all unknown as well as known veins or lodes beneath the surface of that claim, and sought to compel the defendant in that suit to bring forward any claim it might have, known or unknown, to known or unknown ore bodies beneath the Henrietta claim, or failing to do so, to be forever barred and precluded from thereafter setting up any adverse claim to any ore bodies that might thereafter be discovered beneath that claim, notwithstanding it might there-

after be developed that these subsequently discovered ore bodies belonged to a vein which so apexed in a claim of the defendant as to give defendant title thereto by virtue of its extralateral rights. The Court, at page 604, said:

> "The defendants, in the absence of a discovered and known vein emanating from their claims and extending under the Henrietta, cannot, in our opinion, be said to be asserting an adverse claim to the Henrietta mine within the true meaning of the Utah statute. There is no evidence that they were making any claim except to the veins which had been discovered and which formed the subject of the action at law. Obviously they could not make a claim until the facts should develop which, under the law, would give them a right. Their only right was a conditional and contingent one which they might assert, or might not, when the facts arose which would require them to take action."

But in the case at bar, the Rainbow lode beneath the surface of the Black Rock claim and easterly of the 301-foot plane was a known and developed vein at the time the suit was brought. At the time of the trial it had been developed to great depth, far below where it was claimed by plaintiffs (appellees) that there was a union between it and the Pyle branch. Plaintiffs not only knew of the existence of this vein, but they in truth asserted ownership thereof adversely to the defendant in the action, and at the trial vigorously prosecuted

such adverse claim of ownership thereto below the plane of union.

Respectfully submitted,

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